Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

October Term, 1995

LORRAINE RIELLY,

Petitioner,

v.

NEWS GROUP BOSTON, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

PETITION FOR A WRIT OF CERTIORARI

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July 1995

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED.

Where a newspaper article characterized a union employee as being "on the pad," whether, in a resulting tort case for defamation, a state court's action in ruling said phrase incapable of defamatory meaning *per se* and consequently granting summary judgment for respondents, violated the limitations of the Free Speech guaranty of the First Amendment as well as the Due Process protection of the Fifth and Fourteenth Amendments.

LIST OF PARTIES.

Lorraine Rielly, Petitioner

News Group Boston, Inc.
d/b/a The Boston Herald
Pat Purcell
Joe Sciacca
Patricia Mangan
Laura Raposa
Jonathan Wells
Robert Connolly
Jeff Jacoby, Respondents

List of parties before the Court is identical to list of parties to the proceedings below.

Table of Contents.

Questions presented	i
List of parties	ii
Table of authorities	iv
Opinions below	1
Jurisdiction	1
Constitutional provisions involved	2
Statement of the case	2
A. The context of the *Boston Herald* article	3
B. Proceedings below	5
Reasons for granting petition	7
Argument	7
I. First Amendment offers no protection that would render the newspaper characterization incapable of defamatory meaning *per se*	7
II. The state court grant of summary judgment in favor of respondents deprived petitioner of Due Process protection under the Fifth and Fourteenth Amendments	10
III. The Decision of the Appeals Court of Massachusetts is erroneous and contradictory	11
IV. The question presented is important	12
Conclusion	12

Table of Authorities Cited.

CASES.

Attorney General v. Bailey, 386 Mass. 367, *cert. denied*, 459 U.S. 970 (1982) 10

Bishop v. Wood, 426 U.S. 341 (1975) 10, 12

Board of Regents v. Roth, 408 U.S. 564 (1972) 8, 11

Calder v. Jones, 465 U.S. 783 (1984) 10

Chaplinsky v. New Hampshire, 315 U.S. 568 (1941) 7

Community National Bank v. Dawes, 369 Mass. 550 (1976) 10

Fidelity v. Deposit Co. of Maryland v. United States, 187 U.S. 315 (1902) 10

Gertz v. Welch, 418 U.S. 323 (1973) 10, 11, 12

Goss v. Lopez, 419 U.S. 565 (1975) 10, 11, 12

Griswold v. Connecticut, 381 U.S. 479 (1965) 11

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1988) 9

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1950) 12

Jones v. Taibbi, 400 Mass. 786 (1987) 8

Kaityz v. Foreign Motors, Inc., 25 Mass. App. Ct. 198 (1987) 10

King v. Globe Newspaper Co., 400 Mass. 705 (1987) 8

Lyons v. News Group Boston, Inc., et al., No. 91-02644 (Norfolk County Superior Court 1991) 6n, 9

NAGE v. News Group Boston, Inc., et al., No. 91-5625A (Suffolk County Superior Court 1991) 6n, 9

New York Times Co. v. Sullivan, 376 U.S. 254 (1963) 9, 11

Paul v. Davis, 424 U.S. 693 (1975) 8, 9, 11

TABLE OF AUTHORITIES CITED (CONT'D)

Riccardi v. Latif, 3 Mass. App. Ct. 714 (1975) 8

Rielly v. News Group Boston, Inc., et al., 38 Mass. App. Ct. 909 (1995) 6

Rielly v. News Group Boston, Inc., et al., 419 Mass. 1110 (1995) 6

Rosenbloom v. Metromedia, 403 U.S. 29 (1970) 9, 12

Sousa v. Davenport, 3 Mass. App. Ct. 715 (1975) 8

Stone v. Essex County Newspapers, Inc., 367 Mass. 849 (1975) 8

United States v. Brill, 350 F.2d 171 (1965) 9

United States v. Oates, 467 F.2d 129 (3d Cir. 1972), *cert. denied*, 410 U.S. 909 (1973) 9

CONSTITUTIONAL PROVISIONS.

U.S. Const. amend. I i, 2, 5, 7, 12
U.S. Const. amend. V i, 2, 5, 7, 10, 11
U.S. Const. amend. XIV i, 2, 5, 7, 10, 11

STATUTES AND RULES.

28 U.S.C. § 1257(a) 2
29 U.S.C. § 501(c) 9

Massachusetts Rules of Civil Procedure

Rule 56(b) 3, 5
Rule 56(c) 10

TABLE OF AUTHORITIES CITED (CONT'D)

MISCELLANEOUS.

Restatement, Torts § 559 8

The World Book Dictionary, 1493 (1991) 9

Webster's Third New International Dictionary 1619 (1971) 9

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

PETITION FOR A WRIT OF CERTIORARI

Lorraine Rielly respectfully petitions for a writ of certiorari to review the judgment of the Commonwealth of Massachusetts Appeals Court in this case.

Opinions Below.

The denial of further appellate review by the Commonwealth of Massachusetts Supreme Judicial Court (App., *infra*, 1A)[1] is reported at 419 Mass. 1110. The opinion of the Commonwealth

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[1] References to the appendix will be cited as (App., *infra*,).

of Massachusetts Appeals Court (App., *infra*, 2A) is reported at 38 Mass. App. Ct. 909. The opinion of the Commonwealth of Massachusetts Superior Court (App., *infra*, 5A) is unreported.

JURISDICTION.

The Commonwealth of Massachusetts Supreme Judicial Court entered its judgment denying the application for further appellate review on March 27, 1995. (App., *infra*, 1A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED.

The First Amendment to the Constitution of the United States provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. Const. amend. I.

The Fifth Amendment to the Constitution of the United States provides, in relevant part, that no person shall ". . . be deprived of life, liberty, or property, without Due Process of law . . ." U.S. Const. amend. V.

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part, that no state shall ". . . deprive any person of life, liberty, or property, without Due Process of law . . ." U.S. Const. amend. XIV.

STATEMENT OF THE CASE.

Petitioner sued News Group Boston, Inc., and others[2] in August 1991 in the Middlesex County Superior Court, Massachusetts. She alleged defamation, invasion of privacy and the tort of

[2] Pat Purcell, Joe Sciacca, Patricia Mangan, Laura Raposa, Jonathan Wells, Robert Connolly, and Jeff Jacoby.

false light (Civil Action No. 91-05790), as the result of an August 18, 1991 article published in the *Boston Herald*. Respondents moved for summary judgment, pursuant to Mass. R. Civ. P. 56(b), contending, in part, that the words in question were not capable of defamatory meaning. (App., *infra*, 6A). The superior court agreed and allowed respondents' motion. An order entered that petitioner's complaint be dismissed with prejudice. The Appeals Court of Massachusetts affirmed, while acknowledging the critical word at issue, in a different context, could be capable of a pejorative meaning such as racketeering. Petitioner's application for further appellate review was denied by the Supreme Judicial Court of Massachusetts.

A. *The Context of the* Boston Herald *Article*.

This case concerns a determination of whether the phrase "on the pad," as used in the published *Boston Herald* article to characterize petitioner, Lorraine Rielly, is reasonably capable of defamatory meaning. An examination of facts relevant to Lorraine Rielly's employment and the impact of the article is critical to such determination.

Lorraine Rielly is a private individual who happens to be the daughter of Kenneth T. Lyons, President of the National Association of Government Employees (NAGE). NAGE is a national labor union. Ms. Rielly has been employed as a legal secretary by NAGE since 1973. NAGE also employs Mr. Lyons' wife, Evelyn Lyons, as an executive secretary, as well as Kim Saliba, Mr. Lyons' step-daughter, as an insurance benefits manager.

Ms. Rielly is well qualified to serve as legal secretary to the NAGE legal staff. She began working for NAGE in a clerical capacity as a high school student. After being graduated from Aquinas Junior College in Massachusetts with a degree in secretarial science, Ms. Rielly worked as a NAGE receptionist. She subsequently worked for approximately two years as a secretary

in a private law firm. Since that period, she has served as secretary to the NAGE legal staff. In addition, she has established a computerized file management system for that department.

Lorraine Rielly sustained injury as a result of an article published in the "Pols and Politics" column of the August 18, 1991 *Boston Herald* entitled "National Association of Lyons." (App., *infra*, 4A). The article was written by the an investigative journalist employed by the *Boston Herald*, Jonathan Wells. The following article made specific reference to Ms. Rielly.

> Kenneth T. Lyons, president of the National Association of Government Employees (NAGE), must have taken the same night school course in personnel management as his pal, Senate President William M. Bulger.
>
> Lyons, like Bulger, is adept at securing gainful employment for members of his family.
>
> According to NAGE's fiscal year 1990 annual report, Lyons' wife, Evelyn, is on the union's payroll to the tune of $42,644 a year.
>
> Lyons' daughter, Lorraine Rielly, also is on the NAGE pad. She was paid $39,722 last year. Lorraine's husband, Edward Rielly, was reportedly paid by NAGE while he served as a voluntary driver/bodyguard for John R. Silber in last year's governor's race.
>
> If that's not enough, Lyons' step-daughter, Kim Saliba, turns up as the treasurer of a NAGE subsidiary, Insurance Administrators, Inc., whose directors are Lyons and two other top NAGE officials.
>
> Lyons himself draws a $90,565 salary from the union, plus $5,000 in "allowances" and $9,620 in reimbursed expenses. Grand total: $104,825.

Upon learning of the article in question, Ms. Rielly suffered emotional distress, accompanied by clear physical symptoms. She understood "on the pad," within the context in which it was used, to mean she was being paid by NAGE for not working. Through publication, such false allegation seriously impaired her integrity, reputation and good name. Furthermore, she suffered damage in her relationships with colleagues as a result of the article. Ms. Rielly appropriately sought legal redress for her injury, in a timely fashion, in the superior court of Massachusetts.

The question presented here is whether this important right of a private individual to protect her reputation and restore her good name through a civil action pursuant to the First, Fifth, and Fourteenth Amendments to the Constitution, can be dismissed by a court finding the injurious words incapable of dafamatory meaning *per se* and consequently granting summary judgment.

B. *Proceedings Below.*

On August 26, 1991, petitioner brought an action in Middlesex County Superior Court, Massachusetts, for defamation, invasion of privacy and the tort of false light (Civil Action No. 91-05790), as a result of the August 18, 1991 article published in the *Boston Herald*. On March 14, 1994, respondents filed a motion for summary judgment on all counts of the complaint, pursuant to Mass. R. Civ. P. 56(b). On May 5, 1994, respondents' motion was allowed. An order entered that the complaint be dismissed with prejudice. The order was dated May 10, 1994. The Middlesex County Superior Court held the phrase "on the NAGE pad" could only mean "on the NAGE payroll" when read in context. "Because the statement was true, the publication was not defamatory." (App., *infra*, 5A). On May 26, 1994, petitioner's notice of appeal was docketed in the superior court.

Said article was the basis for two other actions. Evelyn Lyons brought an action for defamation, invasion of privacy and the tort

of false light in Norfolk County Superior Court.[3] NAGE and Kenneth T. Lyons brought an action for defamation in Suffolk County Superior Court.[4] Respondents also moved for summary judgment in those cases. On June 28, 1994, Norfolk County Superior Court denied respondents' motion for summary judgment as to the claim for defamation relating to News Group Boston, Inc., d/b/a the *Boston Herald* and Jonathan Wells. The court allowed the motion as to all other claims and respondents. On July 6, 1994, Suffolk County Superior Court denied respondents' motion for summary judgment as it related to the particular paragraph reproduced above containing the phrase "on the NAGE pad." Otherwise the motion was allowed. In denying respondents' motion for summary judgment as to the defamation claim, the superior court in both Norfolk County and Suffolk County held the statements at issue (which include the statement at issue in the case at bar) could reasonably be construed as defamatory, that it was a question of fact for a jury. (App., *infra*, 14A-15A, 20A-22A).

The parties to the Middlesex County case, which is the case at bar, argued the matter before the Appeals Court of Massachusetts on January 5, 1995. On January 20, 1995, the Appeals Court affirmed the judgment. *Rielly* v. *News Group Boston, Inc., et al.*, 38 Mass. App. Ct. 909 (1995). The court concluded " 'on the NAGE pad', in the totality of the article in the context in which it was published," was incapable of defamatory meaning "as a meaning of law." But the court acknowledged "pad" may be capable of defamatory meaning in a different context. (App., *infra*, 2A).

Petitioner filed application for further appellate review with the Supreme Judicial Court of Massachusetts on February 9, 1995. It was denied on March 27, 1995. *Rielly* v. *News Group Boston, Inc., et al.*, 419 Mass. 1110 (1995). (App., *infra*, 1A).

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[3] *Evelyn Lyons* v. *News Group Boston, Inc.*, Civil Action No. 91-02644 (Norfolk County Superior Court).

[4] *NAGE* v. *News Group Boston, Inc.*, Civil Action No. 91-5625A (Suffolk County Superior Court).

REASONS FOR GRANTING THE PETITION.

The Free Speech guaranty of the First Amendment offers no protection that would render the instant newspaper characterization of an individual as "on the pad" incapable of defamatory meaning as a matter of law. On the contrary, false statements which stigmatize good name, reputation and integrity are defamatory. A right exists at common law to be free from defamation. An appropriate opportunity to clear one's name is required. A denial of the opportunity to redress such wrongful injury in court amounts to a deprivation of liberty. The state court grant of summary judgment in favor of the newspaper, for the reason that the phrase in question was incapable of defamatory meaning, deprived petitioner of Due Process protection under the Fifth and Fourteenth Amendments. Further, the decision of the Appeals Court of Massachusetts in this case is erroneous and contradictory. There is a great need for guidance from the Court to the states in balancing First Amendment freedoms with Due Process protections where a claim of defamation is met with a motion for summary judgment.

ARGUMENT.

I. First Amendment Offers No Protection That Would Render the Instant Newspaper Characterization "On the Pad" Incapable of Defamatory Meaning *Per Se*.

Freedom of speech is not absolute. Among the well-delineated exceptions to the protection is defamation. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1941). Defamation falls within the narrowly defined category of communications that do little to promote the free exchange of ideas and

> are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interests in order and morality. *Id.*

The critical question here is whether "on the pad" is capable of defamatory meaning within the context in which it is used in the above-referenced newspaper article. If a communication "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" it is defamatory. *Restatement, Torts* § 559. Charges of dishonesty and immorality against an individual have been recognized as the type of charges with the potential to "seriously damage" "standing and associations" in the community. *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972). "Imputing criminal behavior to an individual is generally considered defamatory *per se*. *Paul* v. *Davis*, 424 U.S. 693, 697 (1975).

The common law doctrine of defamation *per se* is followed by Massachusetts courts where the communication imputes criminal behavior or injures the individual in his/her profession. *Sousa* v. *Davenport*, 3 Mass. App. Ct. 715 (1975); *Riccardi* v. *Latif*, 3 Mass. App. Ct. 714, 715 (1975). In any event, where a communication asserts a fact which subjects an individual to ridicule or scorn by a significant segment of the community, the communication is defamatory. *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 718 (1987); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975). Where the court finds a statement capable of both defamatory and nondefamatory meanings, the ultimate determination is plainly a jury matter. *Jones* v. *Taibbi*, 400 Mass. 786 (1987).

Clearly, as used in the article in question, "on the pad" is reasonably capable of defamatory meaning. Indeed, there is considerable support for the proposition that the phrase is

defamatory *per se*. In both of the companion actions arising from publication of the article in question, the Massachusetts Superior Court found "on the pad", as used in that context, reasonably interpretable as a factual statement that petitioner has a corrupt "no show" job, and therefore reasonably capable of defamatory meaning. *Lyons* v. *News Group Boston, Inc., supra*; *NAGE* v. *News Group Boston, Inc., supra*. (App., *infra*, 14A-15A, 20A-22A).

Furthermore, such false allegations not only seriously impair petitioner's "standings and associations" in the community and injures her professionally, it also implicates her in connection with a federal crime. The United States Code, 29 U.S.C. § 501(c) makes it a federal crime for an employee of a labor organization to unlawfully use assets and monies of the organization. *United States* v. *Brill*, 350 F.2d 171 (2d Cir. 1965) (criminal conviction where officials submitted false vouchers and salary payments); *United States* v. *Oates*, 467 F.2d 129 (3d Cir. 1972), *cert. denied*, 410 U.S. 909 (1973) (criminal conviction for false salary payments). This constitutes defamation *per se*. *Paul* v. *Davis, supra*.

Finally, the dictionary defines "on the pad" as defamatory:

> sharing in graft or dishonest money collected by policemen or other civil servants.

The World Book Dictionary, 1493 (1991).

Even the decision below of the Appeals Court of Massachusetts noted, in "a vastly different context, 'pad' may have a colloquial meaning of 'money paid (as to racketeers) for immunity from molestation,' *Webster's Third New Intl. Dictionary* 1619 (1971)." (App., *infra*, 2A, n.2).

This Court has recognized its obligation in reviewing defamation cases to perform a "de novo" review of the statements and context within which they were issued. *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1988); *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 53 (1970); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1963).

II. The State Court Grant of Summary Judgment in Favor of Respondents, for the Reason the Phrase in Question Was Incapable of Defamatory Meaning, Deprived Petitioner of Due Process Protection Under the Fifth and Fourteenth Amendments.

Summary judgment "prescribes the means of making an issue." *Fidelity* v. *Deposit Co. of Maryland* v. *United States*, 187 U.S. 315, 320 (1902). Massachusetts follows the rule that summary judgment only be granted where no genuine issue of material fact exists. Mass. R. Civ. P. 56(c); *Community National Bank* v. *Dawes*, 369 Mass. 550 (1976). It is the burden of the moving party to so demonstrate. *Attorney General* v. *Bailey*, 386 Mass. 367, 371, *cert. denied, Bailey* v. *Bellotti*, 459 U.S. 970 (1982). In ruling on a motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party. *Kaityz* v. *Foreign Motors, Inc.*, 25 Mass. App. Ct. 198, 202 (1987). The Court has held that summary judgment motions in defamation actions do not entitle the defendants to any "special procedural protections." *Calder* v. *Jones*, 465 U.S. 783, 790-91 (1984). In evaluating petitioner's claim, the court must accept her version of the facts, given summary judgment was granted against her by the state court. *Bishop* v. *Wood*, 426 U.S. 341, 347 (1975).

For the reasons discussed in Argument I above, the instant case was not appropriate for summary judgment because a genuine issue of fact existed as to the meaning of "on the pad." The effect of the summary judgment was to deny petitioner an appropriate hearing, a trial, through which she could restore her good name, reputation and integrity after having been defamed. *Gertz* v. *Welch*, 418 U.S. 323, 341, 345 (1973).

Petitioner's right to be free from defamation and to preserve her reputation is a "constitutionally protected interest in liberty." *Bishop* v. *Wood, supra* at 349; *Goss* v. *Lopez*, 419 U.S. 565 (1975). This Court recognizes "the strength of the legitimate state

interest in compensating private individuals for wrongful injury to reputation . . ." *Gertz* v. *Welch, supra* at 348.

Clearly, petitioner was entitled to an "appropriate hearing" as a matter of due process. *Goss* v. *Lopez, supra* at 579. The critical question here is what type of "hearing" was required, given the circumstances of petitioner's defamation claim and injury? Obviously, petitioner deserved an opportunity to clear her name. *Board of Regents* v. *Roth, supra* at 573.

A civil jury trial was the only appropriate forum to afford petitioner such an opportunity. The action of the Massachusetts courts in denying petitioner a jury trial on the merits of her claim amounted to an "invalid restriction" on her right to seek redress through the courts. Every citizen has a constitutionally protected right to "maintain" his/her reputation without state interference. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Consequently, the action of the Massachusetts courts deprived petitioner of her liberty without Due Process, in violation of the Fifth and Fourteenth Amendments. *New York Times Co.* v. *Sullivan, supra* at 264. The state altered petitioner's legal status. This in combination with the defamation claim invoked the Due Process procedural safeguards guaranteed by the Constitution. *Paul* v. *Davis, supra* at 708-09.

III. The Decision of the Appeals Court of Massachusetts in This Case Is Erroneous and Contradictory.

For the reasons discussed in Arguments I and II above, the decision of the Appeals Court of Massachusetts in this case is erroneous. It is also plainly contradictory on its face as it acknowledges "on the pad" capable of defamatory meaning under certain circumstances, yet ignores their relevance here. (App., *infra*, 2A, n.2).

IV. The Question Presented Is Important.

The Court has the clear authority to review the application of law by the Massachusetts courts. *Bishop* v. *Wood, supra* at 345-47. Further, it has recognized that the "Due Process clause . . . forbids arbitrary deprivations of liberty." *Goss* v. *Lopez, supra* at 574. This is the proper case for the Court to provide guidance to the states in balancing the free speech guaranty of the First Amendment and the state's "legitimate interest" in citizens redressing defamation. *Gertz* v. *Welch, supra* at 342. Clarification by this Court as to the Due Process protections in relation to summary judgment, where a constitutionally protected liberty is at risk, is extremely important. Even within the superior court of a single state, Massachusetts, there is no consensus. (App., *infra*, 5A, 10A and 17A). *See Rosenbloom* v. *Metromedia, supra* at 55. "The touchstone of justiciability is injury to a legally protected right . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1950).

CONCLUSION.

The Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

Appendix A
Notice of denial of F.A.R. application dated March 27, 1995 1A

Appendix B
Opinion of the Commonwealth of Massachusetts Appeals Court dated January 20, 1995 2A

Appendix C
Article published in the "Pols and Politics" column of the August 18, 1991 *Boston Herald* entitled "National Association of Lyons", appended to Appeals Court decision 4A

Appendix D
Opinion of the Commonwealth of Massachusetts Superior Court dated May 5, 1994 5A

Appendix E
Motion of all defendants for summary judgment on all counts dated February 17, 1994 6A

Appendix F
Clerk's notice dated May 10, 1994 9A

Appendix G
Memorandum of decision and order on defendants' motion for summary judgment dated June 28, 1994 10A

Appendix H
Memorandum of decision and order on defendants' motion for summary judgment dated July 6, 1994 17A

Appendix I 24A

United States Code

28 U.S.C. § 1257 24A
29 U.S.C. § 501(c) 24A

Massachusetts Rules of Civil Procedure

Rule 56 25A

APPENDIX A.

Supreme Judicial Court
for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Elizabeth A. Ritvo, Esquire
Brown, Rudnick, Freed & Gesmer
1 Financial Center
Boston, MA 02111

RE: Docket No. FAR-07708

LORRAINE RIELLY

v.

NEWS GROUP BOSTON & others

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on March 27, 1995, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: March 27, 1995

To: Neal Marshall Brown, Esquire
Elizabeth A. Ritvo, Esquire

APPENDIX B.

94-P-1218 Appeals Court

LORRAINE RIELLY vs. NEWS GROUP BOSTON, INC., & others.[1]

No. 94-P-1218. January 20, 1995.

Libel and Slander. Words, "Pad."

This action for defamation concerns a phrase in a Boston Herald newspaper article. *See* Appendix. The defendant, owner of the Boston Herald, published information pertaining to the specific annual compensation paid by the National Association of Government Employees (NAGE), a labor union organization, to the plaintiff, an employee, and several of her relatives, who also are employees, her father being the president. Upon determining the use of the phrase in question was not defamatory, a judge of the Superior Court allowed the defendants' motion for summary judgment. We affirm.

The plaintiff would like us to focus specifically on a word — "pad" — in the phrase in question. This we will not do. "The court must consider all the words used, not merely a particular phrase or sentence." *Myers* v. *Boston Magazine Co.*, 380 Mass. 336, 341 (1980).

Examining the phrase, "Lorraine Rielly, also in on the NAGE pad," in the totality of the article in the context in which it was published, we conclude as matter of law that that phrase was not capable of defamatory meaning." *See Foley* v. *Lowell Sun Publishing Co.*, 404 Mass. 9, 11 (1989).[2] The judge correctly dismissed the complaint with prejudice.

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[1] Pat Purcell, Joe Sciacca, Patricia Mangan, Laura Raposa, Jonathan Wells, Robert Connolly, and Jeff Jacoby.

[2] In a vastly different context, the word "pad" may have a colloquial meaning of "money paid (as to racketeers) for immunity from molestation," *Webster's Third New Intl. Dictionary* 1619 (1971).

By way of dicta, we add that the references to certain other persons in the article in question could not reasonably be interpreted as a legally cognizable defamatory publication.

Judgment affirmed.

Neal N. Brown for the plaintiff.

Elizabeth A. Ritvo (*Thomas W. Evans* with her) for the defendants.

APPENDIX C.

Boston Sunday Herald, August 18, 1991

POLS & POLITICS

National Assoc. of Lyons

Kenneth T. Lyons, president of the National Association of Government Employees (NAGE), must have taken the same night school course in personnel management as his pal, Senate President William M. Bulger.

Lyons, like Bulger, is adept at securing gainful employment for members of his family.

According to NAGE's fiscal year 1990 annual report, Lyons' wife, Evelyn, is on the union's payroll to the tune of $42,644 a year.

Lyons' daughter, Lorraine Rielly, also is on the NAGE pad. She was paid $39,722 last year. Lorraine's husband, Edward Rielly, was reportedly paid by NAGE while he served as a voluntary driver/bodyguard for John R. Silber in last year's governor's race.

If that's not enough, Lyons' stepdaughter, Kim Saliba, turns up as the treasurer of a NAGE subsidiary, Insurance Administrators, Inc., whose directors are Lyons and two other top NAGE officials.

Lyons himself drew a $90,565 salary from the union, plus $5,000 in "allowances" and $9,260 in reimbursed expenses. Grand total: $104,825.

APPENDIX D.

RIELLY vs. NEWS GROUP BOSTON, INC., ET AL.
CIVIL ACTION NO. 91-5790
(MIDDLESEX COUNTY SUPERIOR COURT)

Endorsement by the Court, Zobel, J., on the face of Motion of All Defendants for Summary Judgment on All Counts.

Memorandum: The sentence in question read in context, especially the context of the immediately preceding sentence, is that Mr. Lyons hired members of his family, including Plaintiff. "On the NAGE pad" in the context can only mean "on the NAGE payroll." Because the statement was true, the publication was not defamatory. Motion Allowed. Ordered — Complaint Dismissed with Prejudice.

H. B. Zobel 5/5/94

APPENDIX E.

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Superior Court Department
of the Trial Court
Civil Action No. 91-5790

Lorraine Rielly,
Plaintiff,

v.

News Group Boston, Inc. d/b/a
The Boston Herald, Pat Purcell,
Joe Sciacca, Patricia Mangan,
Laura Raposa, Jonathan Wells,
Robert Connolly and Jeff Jacoby,
Defendants.

MOTION OF ALL DEFENDANTS FOR SUMMARY JUDGMENT ON ALL COUNTS

Pursuant to Mass. R. Civ. P. 56(b), the defendants, News Group Boston, Inc., publisher of the *Boston Herald*, and its employees, Patrick Purcell, Joe Sciacca, Patricia Mangan, Laura Raposa, Jonathan Wells, Robert Connolly and Jeff Jacoby move for the entry of summary judgment in their favor on all counts of the Plaintiff's Complaint. As grounds therefore, set forth more fully in the memorandum submitted in support of this motion, defendants state that:

1. On August 18, 1991, the *Herald* published its "Pols & Politics" column. At issue is a portion of this column written by defendant Jonathan Wells and entitled "National Assoc. of Lyons." It concerned the undisputed fact that Kenneth T. Lyons was the president of the National Association of Government Em-

ployees, and that a number of Lyons' relatives, including the plaintiff Lorraine Rielly, were employees of, and paid by, NAGE or its subsidiary.

2. To recover on her claim for defamation, the plaintiff must establish that the publication complained of is: (a) of and concerning her, (b) false, (c) defamatory, (d) a statement of fact, (e) published with fault on the part of the publisher, and (f) that she suffered damages as a result of the alleged publication. If the plaintiff cannot prove each of these elements, her action for defamation must fail.

3. The column complained of is a statement of opinion and not fact or is not capable of defamatory meaning. Thus, the column cannot form the basis of a libel action.

4. To prevail on her claim of invasion of privacy, the plaintiff must show the defendants published information about the plaintiff that was not already a matter of public record. The information in the column regarding Lorraine Rielly's employment and salary is a matter of public record and thus, her invasion of privacy claim must fail.

5. The plaintiff's claim that the defendants are liable for having placed her in a "false light" must fail because the tort of placing someone in a "false light" is not recognized by the courts of Massachusetts.

6. The defendants Patrick Purcell, Joe Sciacca, Patricia Mangan, Laura Raposa, Robert Connolly and Jeff Jacoby did not write, contribute to or in any other way participate in the preparation of the portion of the *Herald* column of which the plaintiff complains and, hence, have no liability to the plaintiff.

7. All material facts pertinent to a resolution of the issues raised above are not in dispute.

In support of this motion, the defendants rely upon their supporting memorandum, the affidavits of Jonathan Mills, Patrick Purcell, Joe Sciacca, Patricia Mangan, Laura Raposa, Robert Connolly and Jeff Jacoby, the Complaint, Lorraine Rielly's

Answers to Interrogatories, Kenneth T. Lyons' Answers to Interrogatories, Jonathan Wells' Deposition Exhibit No. 2 and various deposition excerpts.

WHEREFORE, as a matter of law and in the absence of disputed material facts, the defendants are entitled to the entry of summary judgment in their favor.

Respectfully submitted,

NEWS GROUP BOSTON, INC. d/b/a
THE BOSTON HERALD, PAT PURCELL,
Editor, JOE SCIACCA, PATRICIA MANGAN,
LAURA RAPOSA, JONATHAN WELLS,
ROBERT CONNOLLY and JEFF JACOBY,
By their Attorney,

/s/_____

Elizabeth A. Ritvo (BBO #421440)
Thomas W. Evans (BBO #552820)
BROWN, RUDNICK, FREED & GESMER
One Financial Center
Boston, MA 02111
Telephone: (617) 330-9000

Dated: February 17, 1994

APPENDIX F.

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX
THE SUPERIOR COURT

CIVIL DOCKET #MICV91-05790

RE: Rielly v. News Group Boston, Inc., dba et al

TO: Thomas W Evans
Brown, Rudnick, Freed & Gesmer
1 Financial Center
Boston, MA 02111

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 05/05/94 is as follows:

Motion # 5 (on copy) of All Defts for Summary Judgment on All counts, is; — which see — ALLOWED. ORDERED: Complaint Dismissed With Prejudice. (Zobel, J.) copies of endorsement mailed 5/10/94

Dated at Cambridge, Massachusetts this 10th day of May, 1994.

Edward J. Sullivan,
Clerk of the Courts

BY: C Carney, Asst Clerk

Location: Rm 12A (Cambridge)
Telephone: 617-494-4341

APPENDIX G.

COMMONWEALTH OF MASSACHUSETTS

Norfolk, ss.

Superior Court
Civil Action
No. 91-02644

EVELYN LYONS,
Plaintiff,
vs.
NEWS GROUP BOSTON, INC. d/b/a
THE BOSTON HERALD & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the court on the defendants' motion for summary judgment pursuant to Mass. R. Civ. P. 56(c). Plaintiff Evelyn Lyons (plaintiff) brought this action against News Group Boston, Inc. d/b/a The Boston Herald (The "Herald"), The Herald's publisher, Pat Purcell, and six Herald columnists, Joe Sciacca, Patricia Mangan, Laura Raposa, Jonathan Wells, Robert Connolly, and Jeff Jacoby. Plaintiff alleges defamation, invasion of privacy and portrayal in a false light as a result of an article published in The Herald on August 18, 1991. For the following reasons, defendants' motion for summary judgment is allowed in part and denied in part.

---

[1] Pat Purcell, Joe Sciacca, Patricia Mangan, Laura Raposa, Jonathan Wells, Robert Connolly and Jeff Jacoby.

BACKGROUND

Evelyn Lyons is an executive secretary for the National Association of Government Employees (NAGE). She is married to the President of NAGE, Kenneth T. Lyons. Evelyn Lyons' daughter, Kim Saliba, and her stepdaughter, Lorraine Rielly, are also employed by NAGE.

NAGE is a national labor union which represents federal, state and local government employees throughout the United States. As such, NAGE is required by federal law to file a report with the U.S. Department of Labor listing the names and salaries of its employees. This is a public document. Evelyn Lyons, Kenneth T. Lyons, Kim Saliba and Lorraine Rielly, along with their salaries, were all listed on NAGE's 1990 report.

On August 18, 1991, the Herald published its "Pols & Politics" column, which consists of a number of short articles focusing on politics in Massachusetts. The portion of the column currently at issue appeared under the headline "National Assoc. of Lyons" and read as follows:

> Kenneth T. Lyons, president of the National Association of Government Employees (NAGE), must have taken the same night school course in personnel management as his pal, Senate President William M. Bulger.
>
> Lyons, like Bulger, is adept at securing gainful employment for members of his family.
>
> According to NAGE's fiscal year 1990 annual report, Lyons' wife, Evelyn, is on the union's payroll to the tune of $42,644 a year.
>
> Lyons' daughter, Lorraine Rielly, also is on the NAGE pad. She was paid $39,722 last year. Lorraine's husband Edward Rielly was reportedly paid by NAGE while he served as a voluntary driver/bodyguard for John R. Silber in last year's governor's race.

> If that's not enough, Lyons stepdaughter, Kim Saliba, turns up as the treasurer of a NAGE subsidiary, Insurance Administrators, Inc., whose directors are Lyons and two other top NAGE officials.
>
> Lyons himself drew a $90,565 salary from the union, plus $5,000 in "allowances" and $9,260 in reimbursed expenses. Grand total: $104,825.

This article was written by Herald reporter Jonathan Wells.

DISCUSSION

Summary Judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. *Cassesso* v. *Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank* v. *Dawes*, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, "and [further] that the moving party is entitled to judgment as a matter of law." A party moving for summary judgment who does not have the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative evidence that negates an essential element of the opponent's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner* v. *Technical Communications Corp.*, 410 Mass. 805, 809 (1991); accord, *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat [the] motion." *Pederson, supra*, 404 Mass. at 17. "[T]he opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment." *LaLonde* v. *Eissner*, 405 Mass. 207, 209 (1989).

A. *Defendants Joe Sciacca, Patricia Mangan, Laura Raposa, Robert Connolly and Jeff Jacoby.*

In his affidavit, defendant Jonathan Wells states that he alone wrote the article at issue. This contention is supported by the affidavits of the other defendant reporters. Because there is absolutely no evidence to contradict these assertions, defendants Sciacca, Mangan, Raposa, Connolly and Jacoby are entitled to judgment as a matter of law on all counts.

B. *Defendant Pat Purcell.*

Pat Purcell was publisher of The Herald on the date in question. There is absolutely no evidence to contradict his affidavit stating that he was not involved with the writing or editing of the piece and that he did not specifically direct its publication or even know of its contents prior to publication. Accordingly, Purcell cannot be held personally liable for the article's publication and, therefore, summary judgment is granted in his favor. See generally, *Refrigeration Discount Corp.* v. *Catino*, 330 Mass. 230, 235 (1953); *Buck* v. *Clauson's Inn at Coonamessett, Inc.*, 349 Mass. 612, 614 (1965).

C. *Defendants Jonathan Wells and New Group Boston, Inc. d/b/a the Boston Herald: Defamation.*

Whether a statement is reasonably susceptible of a defamatory meaning is a question of law for the court. *Foley* v. *Lowell Sun Publishing Co.*, 404 Mass. 9, 11 (1989). In order to be defamatory, the statement must hold a plaintiff up to scorn, ridicule, hatred or contempt in the minds of a considerable and respectable segment of the community. *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 718 (1987); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975). In determining whether a statement

is defamatory, the court must examine the statement within the context in which it was published. *Myers* v. *Boston Magazine Co., Inc.*, 380 Mass. 336, 341-42 (1980).

Further, to be considered defamatory, a statement must assert a *fact* about the plaintiff or an opinion based on nondisclosed defamatory facts. " 'The determination whether a statement is a factual assertion or an opinion is a question of law if the statement unambiguously constitutes either fact or opinion'. . . . However, the determination whether a statement is a factual assertion or is a statement of pure opinion is a question of fact if the statement can reasonably be understood both ways." *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 709 (1987) (citations omitted). A statement of opinion "based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." *National Assoc. of Gov't Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. 220, 227 (1979). See also *Lyons* v. *Globe Newspaper Co.*, 415 Mass. 258, 262 (1993). However, where such an opinion implies the allegation of undisclosed defamatory facts as its basis such an action may lie. *Lyons* v. *Globe Newspaper Co.*, 415 Mass. 258, 262 (1993).

The plaintiff focuses upon the following statements in the article as being defamatory: the title of the article "National Assoc. of Lyons"; the statement that Lorraine Rielly is "also on the NAGE pad"; and the statement that the plaintiff's husband is "adept at securing employment for members of his family." When these statements are viewed in the context of the entire article at issue, one could reasonably interpret them as statements of fact implying that the plaintiff was hired by NAGE and keeps her job only because of her husband's nepotism and that she has a job where she does not truly earn her pay. If the fact finder were to make such a determination and then conclude that such assertions were false and were negligently published, the defendants would be liable for defamation.

However, the article could also be read as a statement of pure opinion on the part of the writer, thereby precluding a finding of defamation. Accordingly, because it is a question of fact whether the statements at issue are statements of fact or pure opinion, summary judgment is denied on the claim for defamation.

D. *Invasion of Privacy*

The plaintiff has also brought a claim for invasion of privacy. "A person shall have a right against unreasonable, substantial or serious interference with his privacy." G.L. c. 214, §1B. However, "[w]here the information concerning a plaintiff is already public, a defendant is not liable merely for giving further publicity to that information." *Jones* v. *Taibbi*, 400 Mass. 786, 801 (1987) (citation omitted).

The article in question disclosed no information that was not already public. The plaintiffs' family relationships are public knowledge and the federal report, required under federal law, made her employment by NAGE and her salary, as well as those of her family members, public information. See 29 U.S.C. §§ 431(b) and 435 (1985). Accordingly, as there has been no invasion of the plaintiff's privacy, summary judgment is allowed for the defendants on this claim.

E. *False Light*

Massachusetts does not recognize the tort claim of "false light". *ELM Medical Laboratory, Inc.* v. *RKO General, Inc.*, 403 Mass. 779, 787 (1989); *Jones* v. *Taibbi*, 400 Mass. 786, 801 n.12 (1987); *Fox Tree* v. *Harte-Hanks Communications, Inc.*, 398 Mass. 845, 848-49 (1986). Accordingly, the defendants are entitled to judgment as a matter of law on this claim.

ORDER

For the foregoing reasons, it is hereby ORDERED that:

1. The motion for summary judgment of defendants Pat Purcell, Joe Sciacca, Patricia Mangan, Laura Raposa, Robert Connolly and Jeff Jacoby is ALLOWED and all claims against them are dismissed with prejudice.

2. The motion for summary judgment of defendants News Group Boston, Inc. d/b/a The Boston Herald and Jonathan Wells is ALLOWED as to all claims for invasion of privacy and false light and is DENIED as to the claim for defamation.

/s/_____
Patrick J. King
Justice of the Superior Court

DATED: June 28, 1994

A TRUE COPY

Attest: /s/_____
Deputy Assistant Clerk

June 29, 1994

APPENDIX H.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Superior Court
Civil Action
No. 91-5625A

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC. & another[1]

vs.

NEWS GROUP BOSTON, INC. d/b/a THE BOSTON HERALD & others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is a defamation action brought by the National Association of Government Employees, Inc. ("NAGE") and its president, Kenneth T. Lyons against the News Group, Inc. d/b/a The Boston Herald (the "Herald"), the Herald's editor, Patrick Purcell, and several Herald columnists, Joe Sciacca, Patricia Mangan, Laura Raposa, Jonathan Wells, Robert Connolly and Jeff Jacoby. The plaintiffs allege that they were defamed by an article published in the Herald on August 18, 1991. At oral argument, the parties stipulated to the dismissal with prejudice of the claims against defendants Joe Sciacca, Patricia Mangan, Laura Raposa, Robert Connolly and Jeff Jacoby because these defendants did not con-

[1] Kenneth T. Lyons, President.

[2] Pat Purcell, Editor; Joe Sciacca, Patricia Mangan, Laura Raposa, Jonathan Wells, Robert Connolly and Jeff Jacoby.

tribute to the article at issue. The remaining defendants, the Herald, Purcell and Wells, now move for summary judgment pursuant to Mass. R. Civ. P. 56(c). For the following reasons, defendants' motion for summary judgment is allowed in part and denied in part.

BACKGROUND

The following facts are not in dispute. On August 18, 1991, the Herald published a column bearing the headline "Pols & Politics." The column consisted of several short articles, each focusing on a different Massachusetts political figure. The article at issue, entitled "National Assoc. of Lyons," focused on Lyons's alleged ability to secure jobs at NAGE for members of his family. The article in its entirety read as follows:[3]

[1] Kenneth T. Lyons, president of the National Association of Government Employees (NAGE), must have taken the same night school course in personnel management as his pal, Senate President William M. Bulger.

[2] Lyons, like Bulger, is adept at sècuring gainful employment for members of his family.

[3] According to NAGE's fiscal year 1990 annual report, Lyons' wife, Evelyn, is on the union's payroll to the tune of $42,644 a year.

[4] Lyons' daughter, Lorraine Rielly, also is on the NAGE pad. She was paid $39,722 last year. Lorraine's husband, Edward Rielly was reportedly paid by NAGE while he served as a voluntary driver/bodyguard for John R. Silber in last year's governor's race.

[5] If that's not enough, Lyons' stepdaughter, Kim Saliba, turns up as the treasurer of a NAGE subsidiary, Insurance Admin-

[3] The bracketed numbers identify the article's various paragraphs for ease of reference in the ensuing discussion.

istrators, Inc., whose directors are Lyons and two other top NAGE officials.

[6] Lyons himself drew a $90,565 salary from the union, plus $5,000 in "allowances" and $9,260 in reimbursed expenses. Grand total: $104,825.

DISCUSSION

Summary judgment should be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. *Cassesso* v. *Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank* v. *Dawes*, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, "and [further] that the moving party is entitled to judgment as a matter of law." *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16-17 (1989).

Summary judgment, where appropriate, is highly favored in defamation cases. *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 708 (1987); *Appleby* v. *Daily Hampshire Gazette*, 395 Mass. 32, 37 (1985). "Allowing a trial to take place in a meritless case 'would put an unjustified and serious damper on freedom of expression.'" *Appleby, supra* at 37 (quoting *National Ass'n of Gov't Employees, Inc.*, v. *Central Broadcasting Corp.*, 379 Mass. 220, 233 (1979)).

A.

The plaintiffs allege that the statements at issue in this case are capable of a defamatory meaning, are not constitutionally protected opinion, and were published with reckless disregard for the truth. The defendants maintain that the statements were true, were statements of opinion, and were not published with actual malice.

Not all derogatory statements published about a person are actionable as defamation. In general, the statement must assert, either expressly or by reasonable implication, a *fact* about the plaintiff. Statements that are *opinions* are not actionable unless the opinion is apparently based on defamatory facts which seem to be known to the speaker but which are not disclosed to the listener, so the listener is led to infer that those facts are true. *See Lyons* v. *Globe Newspaper Co.*, 415 Mass. 258, 262 (1993). However, if the opinion expressed is based on facts which are disclosed, it may not be the basis for a defamation action, "no matter how unjustified and unreasonable the opinion may be or how derogatory it is." *Id.*

The statements in paragraph [1] and [2] fall within this protected category. The assertions that Lyons took "the same night school course in personnel management" as Senate President William Bulger and that Lyons "is adept at securing gainful employment for members of his family" are opinions under these principles. *See Myers* v. *Boston Magazine Co., Inc.*, 380 Mass. 336, 341 (1980) (a statement about a local sports announcer to the effect that he was "the only newscaster in town who is enrolled in a course for remedial speaking" was a statement of opinion and could not reasonably be interpreted as a defamatory statement of fact). Accordingly, the defendants are entitled to summary judgment to the extent that the complaint relies on these two opinions.

B.

On the other hand, the statements in paragraph [4] that Lorraine Rielly was "on the NAGE pad" and that her husband Edward Rielly was paid by NAGE "while he served as a voluntary driver/bodyguard for John R. Silber," could reasonably be construed as statements of fact. These statements, read in the context of the article, could plausibly be construed as stating the "facts" (a)

that Lyons puts family members on the payroll (b) who do not actually perform work for NAGE.[4] Whether a statement should reasonably be understood as a factual assertion or as a statement of opinion is a question of fact for the jury to determine. *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 709 (1987).

If the jury should conclude that these statements were opinions, then as previously discussed in part A, the defendants can not be liable for defamation. However, if the jury should conclude that they were factual assertions, the defendants may be liable for defamation if the plaintiffs can also prove, by clear and convincing evidence, that the statements at issue were published with "actual malice." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 856 (1975).[5]

"Actual malice" is proved by a showing that the allegedly defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was true or false. *Stone, supra* at 867. "The test of whether an article was published with knowledge of its falsity or reckless disregard for its falsity

---

[4]The parties dispute whether the statements were false or defamatory. The author of the article, Wells, testified in deposition that he did not understand the phrase "on the NAGE pad" to be defamatory, but rather understood it to mean simply "on the NAGE payroll." The plaintiffs, on the other hand, argue that the phrase "on the pad" disparagingly suggests that Lyons was "padding the payroll" with relatives who do no work, implying a corrupt scheme. Because a reasonable jury could interpret the phrase "on the NAGE pad" to have either the neutral meaning ("on the NAGE payroll") or the disparaging meaning ("having a corrupt no-show job"), the matter cannot be resolved on a motion for summary judgment. Similarly, the statement that Edward Rielly was "paid by NAGE while he served as a voluntary driver/bodyguard" for John Silber could be understood by a reasonable jury as reporting a device by the plaintiffs to provide surreptitious — and perhaps illegal — campaign support to a candidate for governor. The defendants' innocent explication of the statement — that a NAGE employee volunteered in the campaign in his free time — is not so plainly the only reasonable reading to be given the statement that it can be said a jury would err as a matter of law to construe it otherwise.

[5]The plaintiffs must prove "actual malice" because NAGE and Lyons are public figures. *New York Times Co.* v. *Sullivan, supra.* For the purposes of this litigation only, the parties agree that NAGE and Lyons are public figures.

involves a subjective standard." *Lyons* v. *New Mass Media Inc.*, 390 Mass. 51, 57 (1983). The question is whether the defendants themselves knew the statement was false or recklessly disregarded whether it was false. Nonetheless, "actual malice" may be inferred from objective evidence. *Id.* The defendant cannot "automatically insure a favorable verdict by testifying that [they] published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith." *Id.* at 58 (quoting *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968)).

"Reckless disregard" means that the defendants entertained "serious doubts" about the truth of the publication. From the record, it appears that the jury could find that the author of the article had no realistic information that Lorraine or Edward Rielly performed "no-show" jobs at NAGE in the way alleged in paragraph [4]. Therefore, a jury could conclude that Wells, in writing the article (and consequently his supervisors at the Herald, in publishing it) must necessarily have entertained serious doubts about the truth of statements he had no information to support. These factual issues need to be resolved at a trial. Accordingly, summary judgment is denied as it relates to these statements.

C.

The record does not support any claim that the statements in paragraphs [3], [5] or [6] were either false or defamatory. The defendants are entitled to summary judgment as to these.

ORDER

For the following reasons, it is hereby ORDERED that the defendants' motion for summary judgment be DENIED as it relates to the statements in the fourth paragraph of the article in question. The motion is otherwise ALLOWED.

/s/_____
George A. O'Toole, Jr.
Justice of the Superior Court

Dated: July 6, 1994

APPENDIX I.

28 U.S.C. § 1257 states:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

29 U.S.C. § 501(c) states:

Any person who embezzles, steals or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the monies, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for more than five years, or both.

Mass. R. Civ. P. 56 provides in relevant part, as follows:

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

* * *

(2)

Supreme Court, U.S.
FILED
AUG 17 1995
CLERK

No. 95-106

IN THE
Supreme Court of the United States

October Term, 1995

LORRAINE RIELLY,

Petitioner,

v.

NEWS GROUP BOSTON, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ELIZABETH A. RITVO
BROWN, RUDNICK, FREED & GESMER, P.C.
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Boston, Massachusetts 02111
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Counsel for Respondents

August 1995

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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13 pp

Table of Contents.

Statement of the case	1
Procedural history	3
Summary of argument	4
Argument	5
I. This Court lacks jurisdiction to review this case because the decision of the Massachusetts Appeals Court was based exclusively on state grounds	5
II. The petitioner did not raise any federal question before the Massachusetts courts	6
III. The Massachusetts courts did not violate the petitioner's federal procedural due process rights by granting the respondents summary judgment	8
Conclusion	10

Table of Authorities Cited.

CASES.

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	7, 7n
Davis v. United States Government, 742 F.2d 171 (5th Cir. 1984)	9
Engle v. Isaac, 456 U.S. 107 (1982)	9
Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902)	8, 9
Foley v. Lowell Sun Publishing Co., 404 Mass. 9, 11 (1989)	6, 9

Gryger v. Burke, 334 U.S. 728 (1948) 9

Illinois v. Rodriguez, 497 U.S. 177 (1990) 6

Michigan v. Long, 463 U.S. 1032 (1983) 5, 6

Nearis v. Essex County Newspapers, Inc., 2 Mass. App. Ct. 831 (1974) 6

Ricci v. Crowley, 333 Mass. 26 (1955) 6

U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914 (3rd Cir.), *cert. denied*, 498 U.S. 816 (1990) 9

Webb v. Webb, 451 U.S. 493 (1981) 7

STATUTES AND RULES.

United States Constitution

First Amendment 5
Fifth Amendment 5, 7, 8
Fourteenth Amendment 5, 7, 8

United States Code

28 U.S.C. § 1257 (1993) 5, 7

Federal Rules of Civil Procedure

Rule 56 8n, 9n

Massachusetts Rules of Civil Procedure

Rule 56 3, 8n

MISCELLANEOUS.

Restatement (Second) of Torts, § 614 (1977) 9

No. 95-106

IN THE

Supreme Court of the United States

October Term, 1995

LORRAINE RIELLY,

Petitioner,

v.

NEWS GROUP BOSTON, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioner, Lorraine Rielly (the "petitioner"), brought this action for defamation, invasion of privacy and the tort of "false light" against News Group Boston, Inc., publisher of the Boston Herald (hereinafter the "Herald"), and Jonathan Wells, a Herald reporter, complaining of a portion of the August 18, 1991, "Pols & Politics" column written by Wells and published by the Herald (the "Column").[1] The Column concerned the undisputed fact that Kenneth Lyons was president of the National Association of Government Employees ("NAGE"), a

[1] The petitioner's father and stepmother brought separate suits in separate counties against these same respondents based on the Column.

national labor union which represents thousands of federal, state and local employees, and that relatives of Lyons, including his daughter Lorraine Rielly, were employees of NAGE or its subsidiary.[2]

The Column stated in part:

> *National Assoc. of Lyons*
>
> Kenneth T. Lyons, president of the National Association of Government Employees (NAGE), must have taken the same nightschool course in personnel management as his pal, Senate President William M. Bulger.
>
> Lyons, like Bulger, is adept at securing gainful employment for members of his family.
>
> According to NAGE's fiscal year 1990 annual report, Lyons' wife, Evelyn, is on the union's payroll to the tune of $42,644 a year.
>
> Lyons's daughter, Lorraine Rielly, also is on the NAGE pad. She was paid $39,722 last year. Lorraine's husband, Edward Rielly, was reportedly paid by NAGE while he served as a voluntary driver/bodyguard for John R. Silber in last year's governor's race.
>
> If that's not enough, Lyons' stepdaughter, Kim Saliba, turns up as the treasurer of a NAGE subsidiary, Insurance Administrators, Inc., whose directors are Lyons and two other top NAGE officials.

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[2] The petitioner also sued Patrick Purcell, publisher of the Herald, and Joe Sciacca, Patricia Mangan, Laura Raposa, Robert Connolly and Jeff Jacoby, all of whom were Herald reporters who contributed to other portions of the column and none of whom contributed in any way to the portion of the column which concerned the petitioner.

> Lyons himself drew a $90,565 salary from the union, plus $5,000 in "allowances" and $9,260 in reimbursed expenses. Grant total: $104,825.

The Herald published the Column as part of its "Pols & Politics" column. That column contained humorous items and tongue-in-cheek comments. The petitioner herself admitted that she understood that the column contained commentary.

PROCEDURAL HISTORY

The petitioner brought this action in the Superior Court Department of the Trial Court of Massachusetts, Middlesex County (the "Superior Court") on August 26, 1991. After extensive discovery, the respondents moved for summary judgment pursuant to Massachusetts Rule of Civil Procedure 56. The petitioner filed a written opposition to the respondents' motion, and, through her counsel, presented oral argument in opposition to the motion. In her opposition brief and at oral argument, the petitioner did not assert or claim that she would be deprived of any federal constitutional rights if the respondents' motion were granted.

The Superior Court allowed respondents' motion for summary judgment and held that the phrase, "on the NAGE pad", when read in the context of the Column, could only mean "on the NAGE payroll." In its decision, the court did not rely on or refer to any federal statutory, constitutional or decisional law.

The petitioner appealed the Superior Court's decision to the Massachusetts Appeals Court (the "Appeals Court"). In her principle brief and her reply brief in support of her appeal, the petitioner did not assert or claim that the Superior Court's grant of summary judgment deprived her of any federal constitutional right. The Appeals Court affirmed the decision of the Superior Court and held that the phrase, "Lorraine Rielly, also

is on the NAGE pad," "in the totality of the article in the context in which it was published" was not capable of a defamatory meaning as a matter of law. (Petition, App. B). The Appeals Court, in its decision, did not rely on or refer to any federal statutory, constitutional or decisional law.

On February 9, 1995, the petitioner filed an application for further appellate review in the Supreme Judicial Court of the Commonwealth of Massachusetts. In that application, the petitioner argued that the Appeals Court had erred in affirming the Superior Court's grant of summary judgment on her defamation claim.[3] The petitioner did not assert or claim that the actions of either the Superior Court or the Appeals Court had deprived her of any federal constitutional right. On March 27, 1995, the Supreme Judicial Court, without comment, denied the petitioner's application for further appellate review.

SUMMARY OF ARGUMENT

The essence of the Petition is that the petitioner disagrees with the state court's holding that the phrase at issue is not capable of a defamatory meaning as a matter of state law. Such disagreement does not and cannot provide a basis for further appellate review by this Court. Her efforts to introduce unsupported federal constitutional claims at this very late stage of the proceedings should be rejected where she raised no federal questions below and where the state court based its decision on state law.

Because this case does not involve any issue of federal law, the Court lacks jurisdiction to grant the Petition. The Massachusetts trial court found, on summary judgment, and the

[3] The petitioner did not seek review of the Appeals Court's decision to affirm the Superior Court's grant of summary judgment on her claims of invasion of privacy and the tort of "false light."

Appeals Court affirmed, that the Column published by the respondents was not capable of a defamatory meaning and that the petitioner's claim was not actionable under the Massachusetts common law of defamation.

Further, the Petition should not be granted because the petitioner did not raise any federal issue in the state trial or appellate courts. Before the Massachusetts Superior Court, Appeals Court and Supreme Judicial Court, the petitioner never claimed that granting summary judgment for the respondents would violate or even implicate her rights under the First, Fifth or Fourteenth Amendments of the United States Constitution.

Finally, the Massachusetts courts did not violate the petitioner's procedural due process rights by granting the respondents summary judgment. The petitioner was afforded all process due her under the Massachusetts Rules of Civil Procedure. Use of summary judgment procedures to foreclose a civil litigant from proceeding to trial does not constitute a deprivation of due process. Even if the Massachusetts court erred, as a matter of state law, in disposing of the petitioner's claim on summary judgment, such an error by a state court on an issue of state law does not implicate the petitioner's federal rights.

ARGUMENT

I. This Court Lacks Jurisdiction To Review This Case Because The Decision Of The Massachusetts Appeals Court Was Based Exclusively On State Grounds.

The Court lacks jurisdiction over this case because the Massachusetts Appeals Court based its decision on Massachusetts common law, and not on any federal law. 28 U.S.C. § 1257 (1993) (Providing that the Supreme Court may review decisions of state courts only where there is an issue of federal law); *Mich-*

igan v. *Long*, 463 U.S. 1032, 1038 n.4 (1983) (Noting that the jurisdiction of the Court "fails" where a state court's judgment is adequately supported by state law, independent of federal law).

The Appeals Court held as a matter of law that the phrase, "Lorraine Rielly, also is on the NAGE pad," in the context it was used, was not capable of a defamatory meaning. Whether an allegedly libelous statement is capable of a defamatory meaning is an issue that Massachusetts courts traditionally determine as a matter of Massachusetts common law. *Foley* v. *Lowell Sun Publishing Co.*, 404 Mass. 9, 11 (1989); *Ricci* v. *Crowley*, 333 Mass. 26, 27-28 (1955); *Nearis* v. *Essex County Newspapers, Inc.*, 2 Mass. App. Ct. 831 (1974). The Appeals Court, in its reported decision, relied exclusively on Massachusetts case law and did not refer to or discuss any federal statutory, constitutional or decisional law.

As the decision of the Massachusetts Appeals Court does not rest on, and is not interwoven with federal law, there is no jurisdictional basis for this Court to grant a Writ of Certiorari. *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983) (Holding that the Court will review state court decisions only where the decision "fairly appears to rest primarily on federal law or to be interwoven with federal law."); *Illinois* v. *Rodriguez*, 497 U.S. 177, 182 (1990) ("When a state-court decision is clearly based on state law that is both adequate and independent, we will not review the decision.")

II. The Petitioner Did Not Raise Any Federal Question Before The Massachusetts Courts.

This Court should not review the decision of a state court where the petitioner failed to raise any federal issue during the state court proceedings. The petitioner claims that the decision of the state court, in allowing respondents' motion for

summary judgment, violated her rights under the Fifth and Fourteenth Amendments of the United States Constitution. (Petition at p. 7). Such claims are not properly before this Court because the petitioner did not raise those issues before the Massachusetts Superior Court, Appeals Court or Supreme Judicial Court. *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 77-78 (1988) ("At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.")[4]; *Webb* v. *Webb*, 451 U.S. 493, 495 (1981) (Dismissing case without reaching the merits where petitioner failed to specially set up or claim any federal constitutional right during state court proceedings.) (28 U.S.C. § 1257 (1993)) (Requiring that a party seeking review by the Supreme Court have "specially set up or claimed under the [Federal] Constitution" the right which the party seeks to have the Supreme Court enforce.).

Supreme Court Rule 14(h) requires that a petitioner who seeks review of a judgment of a state court "specify the stage in the procedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts." The Petition is devoid of any such specification because, in fact, the petitioner *never* raised, in the Massachusetts courts, the federal issues that she now seeks to have this Court review. Before the Massachusetts Superior Court, Appeals Court, and Supreme Judicial Court, the petitioner never argued that granting respondents summary judgment would violate or even im-

[4] This Court has left open the question of whether failure to raise a federal claim below is a jurisdictional bar, or a prudential restriction. *Bankers Life & Casualty Company* v. *Crenshaw*, 486 U.S. 71, 79 (1988).

plicate her rights under the Fifth or Fourteenth Amendments to the United States Constitution. In particular, the petitioner never argued, as she does to this Court, that she had a due process right under the Fifth and Fourteenth Amendments of the United States Constitution to present her defamation claim to a jury. Therefore, this Court should not grant the Petition for a Writ of Certiorari.

III. The Massachusetts Courts Did Not Violate The Petitioner's Federal Procedural Due Process Rights By Granting The Respondents Summary Judgment.

The petitioner claims that the Massachusetts court violated her right to procedural due process. The petitioner does not allege that the process that led to the state court granting summary judgment was flawed. Instead, she apparently takes the position that the granting of summary judgment is itself a denial of due process because it denies the losing party a trial. (Petition at pp. 10-11). Her argument is without merit.

The petitioner received all appropriate process due a civil plaintiff — she was afforded the opportunity to take discovery, she received notice of respondents' motion for summary judgment, and she had the opportunity to be heard at the hearing the trial court held on respondents' motion for summary judgment. To the extent that the petitioner claims that the granting of summary judgment itself is a denial of procedural due process, her claim is without merit.

The use of the summary judgment procedures is constitutional and does not violate any guarantees of procedural due process.[5] *Fidelity & Deposit Co.* v. *United States*, 187 U.S.

[5] The Superior Court applied Massachusetts Rule of Civil Procedure 56 in granting summary judgment. That rule is nearly identical to Federal Rule of Civil Procedure 56. Granting a Writ of Certiorari in this case would be appropriate only if there is a

315, 320-21 (1902) (Holding that a District of Columbia trial court's granting of summary judgment to a plaintiff did not deprive the defendants of due process of law or of their right to a trial by jury); *Davis* v. *United States Government*, 742 F.2d 171, 173 (5th Cir. 1984) (Holding that plaintiff's constitutional right to a jury was not "violated by the granting of summary judgment for there were no material facts in dispute.")

In defamation cases, the specific issue of whether the publication at issue is capable of a defamatory meaning is initially an issue of law for the judge to decide. *Foley* v. *Lowell Sun Publishing Co.*, 404 Mass. 9, 11 (1989) ("[I]n a defamation action a threshold issue is whether the statement is reasonably susceptible of a defamatory meaning, and that determination is a question of law for the court."); *U.S. Healthcare, Inc.* v. *Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3rd Cir.), *cert. denied*, 498 U.S. 816 (1990); Restatement (Second) of Torts, § 614 (1977) ("The court determines (a) whether a communication is capable of bearing a particular meaning, and (b) whether that meaning is defamatory.")

The petitioner claims that the state court erred when it granted summary judgment to the respondents. She argues that there was a genuine issue of material fact as to whether the phrase, "on the NAGE pad", in the context it was published, was capable of a defamatory meaning. (Petition, pp. 8-9). However, even if the state court erred in its application of state law, which the respondents do not concede, any such error does not and cannot constitute a violation of the petitioner's *federal* constitutional right to procedural due process. *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982) ("We have long recognized that a 'mere error of state law' is not a denial of due process."); *Gryger* v. *Burke*, 334 U.S. 728, 731

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serious issue, which there is not, as to the constitutionality of Federal Rule of Civil Procedure 56.

(1948) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.")

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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